Supreme Court, U.S.
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No 90-1248

In The Supreme Court of the United States

October Term, 1990

CHANCE CORDREY, a minor; and KAREN AND ROBERT CORDREY, on behalf of their minor son,
Petitioners,

—*v.*—

R.J. EUCKERT, Superintendent; GREGG SIMON, MARIANN GLECKLER, CAROL KLECK, RICHARD NAPIERALA, and LOREN PENNINGTON, in their capacities as members of the Evergreen Board of Education; EVERGREEN LOCAL SCHOOL DISTRICT; EVERGREEN BOARD OF EDUCATION,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's evaluation of a handicapped child's need for extended school year services through the use of a strict "regression/recoupment" standard conflicts with this court's decision in *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176 (1982) and Congressional intent under the Education for the Handicapped Act that each handicapped child receive an individualized "free appropriate public education."

2. Whether the Sixth Circuit's application of traditional procedural notions by allocating the burden of proof to the parents and by creating a harmless error exception to a school district's obligation to comply with procedural safeguards of the Education of the Handicapped Act is contrary to this Court's rulings and Congress' remedial intent.

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Pursuant to Rule 15.7 of the Rules of the Supreme Court, the petitioners, Karen and Robert Cordrey on behalf of their minor child Chance, submit a supplemental brief in support of their petition for a writ of certiorari. This brief brings to the Court's attention a new case not previously available to petitioners at the time of the filing of the petition. This case squarely fits within and strengthens petitioners' arguments in the first reason for granting the writ.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S USE OF A REGRESSION RECOUPMENT TEST FOR DETERMINING A HANDICAPPED STUDENT'S ENTITLEMENT TO EXTENDED SCHOOL YEAR SERVICES IS (a) UNSUPPORTED BY THE STATUTE, (b) CONFLICTS WITH THE REASONING OF THIS COURT, AND (c) DEMONSTRATES THE CONFUSION AMONG THE CIRCUITS

On December 11, 1990, the U.S. Court of Appeals for the Tenth Circuit decided *Johnson v. Independent School District No. 4*, 921 F.2d 1022 (10th Cir. 1990)[1] and held that the regression-recoupment analysis is not the only measure to determine the necessity for a structured summer educational program. The Sixth Circuit's opinion in this case is in direct conflict with the Tenth Circuit's opinion in *Johnson*.

The court of appeals in this case resolved the issue of the proper standard for determining whether a handicapped child is entitled to extended school year (ESY) services by establishing a strict regression/recoupment test: the parent must establish that the child's educational skills will regress to such a degree over the summer break that the child will not recoup them in a reasonable time. *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir, 1990).

In direct conflict with the Sixth Circuit, the Tenth Circuit in *Johnson* recognized that, while it would be easier for those involved in the administrative process or court review under the Education of the Handicapped Act (20 U.S.C. Section 1415) to have only one criterion for evaluating the appropriateness of the

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1. The *Johnson* opinion was printed in the February 8, 1991 supplement of the Education of the Handicapped Law Reporter, seven days after the petition for certiorari was filed in this case. On February 14, 1991, Petitioners informed Respondents of their intention to file a supplemental brief.

handicapped child's individualized education program (IEP), "the handicapping impediments which force individualization of the child's education program in the first place also mandate an individualized approach to review of the child's IEP." *Id.* at 1027. In explaining its conclusion, the Tenth Circuit quoted the admonishment in *Board of Education v. Rowley*, 458 U.S. 176 (1982) that administrative and court review may not limit analysis of the appropriateness of the IEP to any single criterion. The Tenth Circuit stated: "This restraint is as applicable to a specific education program element, such as whether a child should be provided an [ESY], as it is to a generalized issue such as the 'adequacy of educational benefits . . .'" *Id.* at 1028 (Citations omitted).

The Tenth Circuit enumerates a list of factors, in addition to evidence of past regression, which should have been considered as part of the evaluation of appropriateness of the IEP and the child's entitlement to an ESY. These include: the degree of the child's impairment, the ability of the child's parents to provide educational structure at home, the child's rate of progress, the child's behavior and physical problems, the availability of alternative resources, the ability of the child to interact with nonhandicapped children, the areas of the child's curriculum which need continuous attention, the child's vocational needs, and whether the requested services are extraordinary for the child's condition, as opposed to an integral part of a program for those with the child's condition. *Id.* at 1030, n.9. The court added that this list was not intended to be exhaustive, nor was it intended that each element would impact planning for each child's IEP. *Id.* Furthermore, the court said that an inquiry into these factors was particularly necessary because of the conflict in the evidence concerning the child's past regression.[2] Because the administrative hearing of-

2. As in this case, the evidence in *Johnson* was that the independent experts concluded that the child would regress in the absence of a summer program but employees of the school district concluded the child would not regress.

ficer, state review officer and the lower court focused so completely on only one component of the child's education (i.e. regression/recoupment), the Tenth Circuit concluded that they "erred by converting what should have been a multifactored inquiry into application of a single, inflexible criterion." *Id.* at 1031.

The Tenth Circuit's opinion is consistent with precedents in the Third, Fifth and Eighth Circuits, but the Sixth Circuit's opinion in this case is an anomaly.[3] In support of its conclusion, the Tenth Circuit cites *Battle v. Commonwealth of Penn.*, 629 F.2d 269 (3rd Cir. 1980); *Yaris v. Special School District of St. Louis County*, 558 F.Supp. 545 (E.D. Mo. 1980), *aff'd*, 728 F.2d 1055 (8th Cir. 1984) and; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), *cert. denied* 109 S.Ct. 839 (1989). The Sixth Circuit's opinion in this case is consistent only with its own precedent set in *Rettig v. Kent City School District*, 539 F.Supp. 768 (N.D. Ohio 1981) *aff'd*, 720 F.2d 463 (6th Cir. 1983) *cert. denied* 467 U.S. 1201 (1984). In the Sixth Circuit, the regression/recoupment criterion has "stray(ed) too far from its statutory source and (has) take(n) on a life of its own . . ." *Cordrey v. Euckert*, 917 F.2d 1460, 1471 (6th Cir. 1990).

This Court should exercise its authority to: 1) correct the Sixth Circuit's departure from this Court's holding in *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982) and 2) ensure uniformity in an important rule of law.

Accordingly, Petitioners ask that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit.

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3. In this case, only the Impartial Hearing Officer adopted the five part test of *Lee v. Thompson*, 1982-83 Educ. Handicapped L. Rep. 554:429 (D.H.I. 1988). The State Level Review Officer, District Court and Sixth Circuit applied a strict regression/recoupment test. The five part test of *Lee* is set out in note 11 of Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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